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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 55

ISON H. DILLON,
Plaintiff, Appellee

versus

M/S ORIENTAL INVENTOR,
Defendant, Appellant

PETITION FOR WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Defendant, Appellant

PETITION FOR WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

M/S ORIENTAL INVENTOR, defendants, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on May 18, 1970.

CITATIONS TO OPINIONS BELOW

The opinion of the Trial Judge of the United States District Court, Eastern District of Louisiana, New Orleans Division, dated May 6, 1969, entering judgment

against defendant, M S ORIENTAL INVENTOR, and in favor of petitioner, ISON H. DILLION, is printed in Appendix "A" and is unreported.

The Findings of Fact and Conclusions of Law of the Trial Judge of the United States District Court, Eastern District of Louisiana, New Orleans Division, Section "G" dated April 24, 1969, is printed in Appendix "B" and is unreported.

The opinion of the United States Court of Appeals for the Fifth Circuit dated May 18, 1970, is printed in Appendix "C" and reported at F.2d

No application for re-hearing was filed.

JURISDICTION

The Jurisdiction of this Court is invoked pursuant to Title 28, Section 1254 (1) United States Code.

QUESTIONS PRESENTED

(1) In a personal injury action by a longshoreman against a vessel based on unseaworthiness, does a finding that unseaworthiness was caused by a single, isolated and unrepeated failure of a fellow worker violate the reasonable fitness rule and thereby, in effect, make the vessel the insurer of the longshoreman?

(2) Does the inadequate manpower rule as set forth in *Waldron v. Moore McCormack*, 386 US 724 extend to a single isolated unrepeated failure of a fellow worker?

JURISPRUDENCE INVOLVED

1. *Admiral Towing Co. v. Woolen*, 290 F.2d 641.
2. *Boudoin v. Lykes Bros.*, 348 U.S. 336.
3. *Colon v. Trinidad Corp.*, 188 Fed. Supp. 97.
4. *Denare v. U.S.*, 337 F.2d 275.
5. *June T. Inc. v. King*, 282 F.2d 404.
6. *Keen v. Overseas Tankship Corp.*, 194 F.2d 515.
7. *Lieberman v. Matson Navigation Co.*, 300 F.2d 661.
8. *Marshal v. Ove Skou*, 378 F.2d 193.
9. *Mitchell v. Trawler Racer*, 362 U.S. 539.
10. *Santa Maria v. S/S Othem*, 272 F.2d 280.
11. *Smith v. Seitter*, 225 Fed. Supp. 282.
12. *Vickers v. Tamey*, 290 F.2d 433.
13. *Waldron v. Moore McCormack*, 386 U.S. 724.

STATEMENT OF THE CASE

On April 18, 1967, ISON H. DILLION, a longshoreman, was working handling bales of pulp paper in the lower deck of the vessel. At the time of the accident no ship's gear was involved. Dillon was working with his regular partner, Donald Harrison Lewis, a man weighing 250 pounds and 6 feet 5 inches tall.

Earlier in the day, Lewis had injured his knee, had reported the injury to his foreman and had continued to work. His knee was swollen and painful; however at no time except at the moment of the injury did he have any difficulty performing his work. In addition, following the injury until the work was concluded for the day, there was no further difficulty. At the time of the accident, Dillon and Lewis were lifting one end of a bale of pulp paper, "heading it up." Lewis felt a pain in his knee and in some manner shifted his weight so that the weight of the bale momentarily was on his partner, Dillon. At this moment, the biceps tendon in the right arm of Dillon was torn.

There was no finding by the Trial Court or by the Court of Appeals that two men were not adequate to perform the task.

The Trial Judge, in Paragraph V of the Conclusions of Law which are cited in Appendix "B", stated:

> "The vessel was unseaworthy because of the defect in the knee of Lewis which was a causal factor in the injury of complainant. *Waldron v. Moore McCormack Lines*, 386 US 724."

In its concluding paragraph, the United States Court of Appeals for the Fifth Circuit (quoted in full in Appendix "C") stated:

> "The impairment to Lewis' knee was a condition which had existed for over five (5) hours at the time of the injury. It indicated that Lewis lacked the reasonably necessary fitness for the task at hand. Therefore, it was not clear error

for the Trial Court to have found that Lewis' returned to work after he injured his knee introduced an unseaworthy condition under the circumstances of this case."

From the finding of the United States District Court an appeal was filed to the United States Court of Appeals for the Fifth Circuit, which Court affirmed the District Court on May 18, 1970.

From that decision of the Fifth Circuit, M S ORIENTAL INVENTOR, defendant vessel owner, now seeks a writ of certiorari to the United States Supreme Court.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I.

The United States Court of Appeals for the Fifth Circuit has voided the long established rule that a vessel need only be reasonably fit for its intended purpose.

An onerous burden is the result of the decision for the United States Court of Appeals for the Fifth Circuit in that reasonable fitness has been relegated to the field of semantics and no longer has application to the responsibility and obligation of a vessel owner to supply a seaworthy vessel to those individualss performing traditional seaman's duties aboard her. To what situation could the reasonable fitness rule apply if it does not apply to the facts presented in this case? Don Harrison Lewis, a strapping man of 250 pounds and 6 feet, 5 inches was more than reasonably fit to perform the duties of a longshoreman. The fact that there was a

single, isolated unrepeated failure and that this failure was held to render this vessel unseaworthy in effect results in a finding that each longshoreman must be perfect and consistent in the performance of their duties and that no variation, however slight, will be tolerated.

If this Court should grant the writ requested, the transcript which will then be available will reflect that the testimony of claimant Dillon and his partner, Lewis, was to the effect that longshoremen customarily shift weight of a load while handling same so that occasionally the complete weight of the load does rest upon one man. This is normally encountered in this type of work and the amount of weight which rested on Dillon due to the pain in Lewis' knee, was no greater than the amount of weight which would result when the load was momentarily shifted due to one of the men getting a better grip on the load.

The reasonable fitness doctrine is too well known by this Court to require lengthy citation of jurisprudence:

The following cases will suffice:

Mitchell v. Trawler Racer, 362 US 539 (1960); *Boudoin v. Lykes Brothers Steamship Co.*, 348 US 336 (1955); *Marshall v. Ore Skou*, 378 F.2d 193 (5th Cir. 1967); *Vickers v. Tumey*, 290 F.2d 433 (5th Cir. 1961).

The performance of humans must be viewed differently than the performance of machinery. A piece of machinery which sometimes works and sometimes does not is inadequate and unsafe and requires repair. However, a human who is subject to the frailties of life and who has to work on uneven surfaces and in cramped quarters

may not always deliver the same performance. In addition, some variation in the standard of performance can and must be anticipated. If the injury to Mr. Lewis' knee earlier in the day had resulted in his being unable to reasonably perform the work of a longshoreman, then a different picture would be presented.

It is respectfully submitted that the effect of the holding, if allowed to stand, would be to make the vessel owner the insurer of all persons performing traditional seaman's duties.

Analogous to the reasonable fitness rule is the "reasonably safe" rule. Work aboard a ship presents some unavoidable hazards. It has been the consistent holding of this Court that the vessel does not have to be accident-free. Reasonable safety is all that is required. This certainly would include those hazards to which Mr. Dillon was exposed. It was not unreasonable for him to be exposed to the occasional shifting of weight on him in the course of handling bales of pulp paper. This was a common occurrence in this type of stevedoring operation and the *cause* of the shifting of weight is immaterial. The transcript will clearly reflect that sometimes a longshoreman, when using a hand hook, will have to shift the weight of the load to his partner while he re-positions his hook. Sometimes the weight of the load has to be shifted to one man while the other gets a better grip on the load. In addition, sometimes the weight of the load will be shifted to one man when the other accidentally looses his grip on the load. Such situations are the everyday encounter of a longshoreman and are not "pregnant with danger" to the men involved. The District Judge in the case of *Colon v. Trinadad Corp.*, 188 Fed. Supp. 97 (Sou. Dist. N.Y. 1960) stated the rule succinctly when he said:

> "A seaman is not absolutely entitled to a deck that is not slippery. He is absolutely entitled to a deck that is not unreasonably slippery."

The reasonable safety and fitness which is encountered by the longshoremen has been and should continue to be the test for unseaworthiness. See also *Denaire vs. U.S.*, 337 F2d 275 (2nd Cir. 1964); *Lieberman vs. Matson Navigation Co.*, 300 F2d 661 (9th Cir. 1962); also *Santa Maria vs. 88 Othem*, 272 F2d 280 (2nd Cir. 1959).

II.

The inadequate manpower rule as enunciated in the Waldron case is not applicable; rather the reasonable competence rule as set forth in Boudoin vs. Lykes Brothers Steamship Company, 348 US 336 should apply.

Judge Learned Hand stated in *Keen vs. Overseas Tank-Ship Corp.* 194 F2d 515, when discussing the meaning and application of the warranty of seaworthiness stated:

> "Applied to a seaman, such a warranty is, *not that the seaman is competent to meet all contingencies*; but that he is equal in disposition and seamanship to the ordinary men in the calling." (emphasis supplied)

The partner, Don Harrison Lewis, was, we submit, equal to the ordinary longshoreman; in fact, we submit his physical stature was more than that of the ordinary seaman and that his performance was above that normally encountered from a longshoreman.

The stevedoring operation being performed at the time was not too great in its demands upon two ordinary long-

shoremen such as Dillon and his partner, Lewis. There was no finding by either the Trial Court or the Court of Appeals that there was insufficient manpower. It is, therefore, submitted that the Waldron case, as well as other cases involving inadequate manpower, were improperly applied to the factual situation presented. The cases improperly applied were *June T. Inc. vs. King*, 282 F2d 404, *Admiral Towing Co. v. Woolen*, 290 F2d 641, and *Smith vs. Seitter*, 225 Fed. Supp. 282.

CONCLUSION

A clear need exists to correct the unconstitutional extension of the warranty of seaworthiness to the point the duty of the vessel owner is to supply an accident-free ship as well as men who are competent to meet *all* contingencies. Such is the result of the holding of the United States Court of Appeals for the Fifth Circuit, which holding is in conflict with all other circuits and with the clearly enunciated rules of law applicable to the doctrine of seaworthiness.

For these reasons it is respectfully submitted that the petition should be granted and thereafter that the opinion of the United States Court of Appeals for the Fifth Circuit be reversed.

Respectfully submitted,

McCLENDON AND McCLENDON

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PROOF OF SERVICE

I, William H. McClendon, Jr., attorney for defendant and a member of the bar of the Supreme Court of the United States, hereby certify that on this day, I have served copies of the foregoing application for writs on:

Clifton S. Carl, Attorney
Garrett and Carl
1020 National Bank of Commerce Bldg.
New Orleans, Louisiana 70112

by mailing a copy thereof, postage prepaid addressed to their respective offices, this 14 day of Aug, 1970.

Wm. H. McClendon Jr.
WILLIAM H. McCLENDON, JR.

APPENDIX "A"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

Filed: U. S. District Court, Eastern District of Louisiana
May 6, 1969
A. Dallam O'Brien, Jr., Clerk

No. 68-89

Civil Action, Section G

ISON H. DILLON

versus

THE MS ORIENTAL INVENTOR, her engines, etc.; and MALAYSIA OVERSEAS LINES, LTD.

JUDGMENT

This cause came on for trial on a former day, and after hearing testimony of witnesses and argument of respective counsel, the Court took the matter under submission.

Now, therefore, considering the written reasons of the Court on file herein, and considering the direction of the Court as to entry of judgment;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of the plaintiff Ison H. Dillon against the MS Oriental Inventor and Malaysia Overseas Lines, Ltd., in the sum to be made up as follows:

Past lost wages	$ 4,864.00
Future lost wages	35,000.00
Pain & suffering, past and future	7,500.00
	$47,364.00

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of American Mutual Insurance Co., Intervenor and against Ison H. Dillon, plaintiff, in the amount of $7,021.75, this being recognized and maintained as a compensation lien and shall be paid out of the judgment awarded to the plaintiff.

New Orleans, Louisiana, May 6th, 1969.

(Signed) A. DALLAM O'BRIEN, JR.
A. Dallam O'Brien, Jr., Clerk

Approved as to form:

UNITED STATES DISTRICT JUDGE
Clifton S. Carl, Esq.
Stuart A. McClendon, Esq.
Paul A. Nalty, Esq.

APPENDIX "B"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

NO. 68-89

Civil Action, Section G

ISON H. DILLON

versus

THE MS ORIENTAL INVENTOR, etc., et al

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on for trial on Friday, January 24, 1969, without the intervention of a jury. The Court having taken time to consider now makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

I.

On April 18, 1967, complainant was employed aboard the M.S. Oriental Inventor by New Orleans Stevedoring Co., Inc. as a longshoreman.

II.

On that day the M.S. Oriental Inventor was owned by defendant Malaysia Overseas Lines, Ltd.

III.

On that day the vessel was anchored in the Mississippi River, a navigable water of the United States, at the Port of New Orleans within the limits of the Eastern District of Louisiana.

IV.

On this day complainant and other members of his gang were stowing bales of pulp paper in a hold of the vessel. A bale of pulp paper weighs in excess of 500 pounds. The bales are rectangular in shape and held together by wires. They are about three and one-half by two by one and one-half feet.

V.

The men were handling the bales by hand after they were brought in by the ship's gear. The whole hatch area was to be filled. The hatch had an area which is denominated by the term "wing". The wing is that area or either side of the hatch which is under the deck of the next above level. The wing adjoins the "square of the hatch" which is the area open to the sky when the hatch covers are off. In order to stow bales in the wings it was necessary to move them from the square of the hatch into the wings.

VI.

As the hatch filled with cargo the distance between the top of the stowed cargo and the overhead in the wing would

become smaller. Eventually the men could not work in the wings except on their knees.

VII.

Complainant's work partner, Lewis, was suffering with a physically infirm knee. His knee had become swollen to a degree and was not sufficient for the heavy task at hand.

VIII.

While complainant and Lewis were maneuvering a bale in the wing, working on their knees, in an operation known as "heading the bale" the pain and infirmity in the knee of Lewis became acute and as a result the weight of the bale, which should have been borne equally between complainant and Lewis, fell entirely on Dillon injuring his biceps. The long head of the biceps was torn loose at the superior pole. This is a painful injury to the arm. The arm was operated on at Touro Infirmary on April 25, 1967. He did not reach maximum medical improvement until December 4, 1967, a period of nearly 33 weeks.

IX.

Complainant was discharged with a 15 percent permanent partial disability of his left arm and shoulder. The medical evidence offered was to the effect that the complainant could not work in comfort above shoulder level. There is evidence that eventually in all loading operations work must be performed overhead. It is of record that longshoremen must climb tall ladders of regular course. There is no evidence to contradict the testimony that a longshoreman who cannot work above shoulder level cannot get a job. The dangers attendant upon a less than whole man working in this occupation are already amply documented in this case by the experience of Lewis and the effect of

Lewis' injury on complainant. The Court finds that complainant cannot and indeed should not compete in the common labor market.

X.

Complainant had an average weekly wage of $152.00. This actual wage loss during the 33 weeks until he reached maximum medical improvement was $4,864.00. At the time of injury complainant was 56 years old and had a work expectancy of 9 years. This is $70,200.00, from the date of maximum recovery, in future lost wages. However, some reduction should be considered since the disability will not completely prevent the plaintiff from earning some income. Therefore, the Court believes that $35,000 will adequately compensate the plaintiff for future lost wages and the sum of $7,500 for past and future pain and suffering. This makes a total of $47,364.00.

XI.

Complainant suffered pain from the onset and still suffers pain to a degree. From a productive member of society he has become a charge on society because of his disability which, to a worker such as complainant, is a form of suffering.

XII.

Complainant has received compensation of $5,576 and medical benefits of $1,445.75.

CONCLUSIONS OF LAW

I.

This Court has jurisdiction of this action and venue is properly laid in the Eastern District of Louisiana. 28 U.S.C. § 1333.

II.

The owner of a vessel does not owe the duty to provide a seaworthy vessel, but only one fit for its intended use. *Mahnich vs. Southern S.S. Co.*, 64 S.Ct. 455, 321 U.S. 96 (1944).

III.

This duty, i.e., to provide a seaworthy vessel is absolute and non-delegable and extends to the longshoremen employed in the vessel. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S. Ct. 872 (1946).

IV.

The duty to provide a seaworthy vessel includes the duty to provide manpower equal in all respects to that supplied in a safe operation. *Waldron vs. Moore-McCormack Lines*, 386 U.S. 724 87 S.Ct. 1410 (1967); *Boudoin vs. Lykes Bros. S. S. Co.*, 348 U.S. 336, 75 S.Ct. 382 (1955); *Jane T. Inc. v. King*, 290 F.2d 404 (5th Cir. 1961); *Admiral Towing Co. v. Wooten*, 290 F.2d 641 (9th Cir. 1961); *Smith v. Seitter*, 225 F. Supp. 282 (E.D.N. Carolina, 1964)

V.

The vessel was unseaworthy because of the defect in the knee of Lewis which was a causal factor in the injury of complainant. *Waldron v. Moore-McCormack Lines, supra.*

VI.

Complainant has been damaged in the sum of $47,364.00

VII.

The compensation lien of American Mutual Insurance

Company in the sum of $7,021.75 is recognized and maintained and shall be paid out of the judgment awarded complainant.

The Clerk shall prepare a judgment accordingly.

New Orleans, Louisiana
April 24, 1969

UNITED STATES DISTRICT JUDGE

APPENDIX "C"

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 28281

ISON H. DILLON,

Plaintiff-Appellee,

versus

M. S. ORIENTAL INVENTOR, ET AL

Defendants-Appellants,

versus

NEW ORLEANS STEVEDORING COMPANY,

Intervenor-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

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(May 18, 1970)

Before THORNBERRY, COLEMAN, and INGRAHAM, Circuit Judges.

COLEMAN, Circuit Judge. As the result of a suit charging unseaworthiness, Ison H. Dillon was awarded judgment against the M. S. ORIENTAL INVENTOR,

and its owner, for personal injuries allegedly sustained while working aboard the ship as a longshoreman. We affirm the judgment of the District Court.

Dillon and his fellow longshoreman, Donald Harrison Lewis, were the witnesses to the injury. Their credibility is heavily attacked on appeal. We cannot sustain the attack. Except as to testimony which is inherently incredible, the Courts of Appeal do not substitute their judgment for that of the trial court or jury in the exercise of credibility choices, *United States v. Springfield*, 5 Cir., 1964, 335 F.2d 239; *Chaney v. City of Galveston*, 5 Cir., 1966, 368 F.2d 774, 776. The findings of fact by trial court or jury verdict may not be set aside as clearly erroneous unless we are left with an abiding conviction that a mistake has been made, Rule 52(a) Fed. R. Civ. P., *Chaney v. City of Galveston*, supra.

In the absence of clear error, the evidence must be viewed in the light most favorable to the party who prevailed below, *Fireman's Insurance Company of Newark, New Jersey v. Robbins Coal Company*, 5 Cir., 1961, 288 F.2d 349, cert. denied 368 U.S. 875, 82 S.Ct. 122, 7 L.Ed.2d 77.

Once the matter of clear error is eliminated the only remaining question is whether the finding or verdict is supported by substantial evidence, *Boeing v. Shipman*, 5 Cir., en banc, 1969, 411 F.2d 365.

On April 18, 1967, Dillon was the member of a gang employed in stowing bales of pulp paper in a lower 'tween deck of the ship. By 4:30 p.m. the men were working in a very restricted space, stowing the bales so as to "block out" [fill in] the remaining area. The

situation was such that only two men could work together, on their knees. They would "head up" one of the heavy bales of paper, after which they would roll it over the stow and into the empty space.

Dillon's lifting partner was Donald Harrison Lewis, who was 6 feet, 5 inches tall, and weighed 250 pounds. About 11 o'clock that morning Lewis had hurt his knee, had reported it to his foreman, had obtained authorization for medical assistance, but continued to work. By 4:30 p.m. the knee had swollen to about double its normal size. Lewis continued to work because he "wanted to make the day". It was about 4:30 that Dillon received his injuries. While Dillon and Lewis were trying to head a bale, Lewis' damaged knee "gave way". This caused him abruptly to shift his position, with the result that the whole load unexpectedly fell upon Dillon, from which he suffered a torn biceps tendon. It was for this injury, on the grounds of unseaworthiness, that Dillon recovered judgment.

The familiar maritime warranty of seaworthiness is that the ship and its appurtenances are reasonably fit for carrying the cargo. Unseaworthiness is a species of liability without fault and it extends to stevedores. *Seas Shipping Company v. Sieracki*, 1946, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099. The doctrine is a growing concept, constantly undergoing redefinition as the risks of those protected are enlarged by changing technology and ship board technique.

In *June T., Inc. v. King*, 5 Cir., 1961, 290 F.2d 404, 407 the ship was being operated by a two man crew, whereas the evidence established that a three man crew was both customary and necessary. The Court said:

> * * * there was more for one man to do than was reasonably prudent. Of course, to be inadequately or improperly manned is a classic case of an unseaworthy vessel. See *Boudoin v. Lykes Bros. S.S. Co., Inc.*, 1955, 348 U.S. 336, 75 S.Ct. 382, 99 L.Ed. 354, 1955, A.M.C. 488."

To like effect, *Waldron v. Moore-McCormack Lines*, 1967, 386 U.S. 724, 87 S.Ct. 1410, 18 L.Ed. 2d 482. The Court further held that the test of seaworthiness is to be applied "when and where the work is done".

Admiral Towing Company v. Woolen, 9 Cir., 1961, 290 F.2d 641, is another case which held that an adequate and competent crew is an essential ingredient of seaworthiness and that questions of adequacy and competency are questions of fact, the resolution of which is not to be disturbed on appeal except in compliance with the clearly erroneous rule.

Dillon and Lewis were handling, lifting, and heading extremely heavy bales of paper, weighing between 350 and 500 pounds each. They were working under extremely difficult conditions, in severely limited space. They had to work on their knees. An injured knee, swollen to twice its normal size, brought the reasonable adequacy of Lewis to perform the job at hand into serious question. Thus the finding of the trial judge that "the vessel was unseaworthy because of the defect in the knee of Lewis" is not clearly erroneous.

This Circuit, and others, have insisted that the occurrence giving rise to liability for unseawortihness must be a *condition*, rather than an instantaneous in-

jury occasioned by an act of negligence by a member of the crew. See *Antoine v. Lake Charles Stevedores*, 5 Cir., 1967, 376 F.2d 443; *Robichaux v. Kerr McGee Oil Industries, Inc.*, 5 Cir., 1967, 376 F.2d 447; *Grigsby v. Coastal Marine Service of Texas, Inc.*, 5 Cir., 1969, 412 F.2d 1011; *Reed v. MV Foylebank*, 5 Cir., 1969, 415 F.2d 838.

The impairment to Lewis' knee was a condition which had existed for over five hours at the time of the injury. It indicated that Lewis lacked the reasonably necessary fitness for the task at hand. Therefore, it was not clear error for the trial court to have found that Lewis' return to work after he injured his knee introduced an unseaworthy condition under the circumstances of this case.

The judgment of the District Court is

AFFIRMED.